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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1982

MELVIN COOPER,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELVIN COOPER
Petitioner Pro Se
P.O. Box 1000 D4
Montgomery, PA 17752

(13579)

QUESTIONS PRESENTED

1.Wherein determining sentence and length of incarceration the trial court employed Parole Commission guidelines, and where after incarceration the Parole Commission applied guidelines which differed and increased the petitioner's length of incarceration so that the sentencing court's intentions were frustrated, was the appellant deprived of due process where on a motion to modify sentence pursuant to Rule 35 of the F.R. Cr. Pr. the court denied an application to modify the sentence so as to confirm to the court's original intention.

2.Where the trial court conceded that its sentencing intentions were frustrated by the Parole Commission was the refusal of the sentencing Judge to modify the appellant's sentence a violation of due process in that the petitioner's length of incarceration was

thereby increased.

3. Where the petitioner was sentenced on the basis of erroneous information was it a denial of due process for the sentencing Court to refuse to correct the sentence.

4. Where on timely application to the trial court for relief pursuant to Rule 35 of the F.R.Cr. Pr. the court reviews the appellant's plea and sentencing de novo, including the post-sentencing determination of the Parole Commission to impose a higher guideline increasing the length of appellant's incarceration, was the court's sanctioning of the increased period of incarceration a re-sentencing to a harsher term, depriving the appellant of due process.

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1982
NO.

MELVIN COOPER,
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES :

Your petitioner, MELVIN COOPER, respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals For the Second Circuit, rendered on November 16, 1982, which denied a rehearing of a determination made on September 22,1982, denying an application for relief pursuant to Federal Rules of

Criminal Procedure 35.

Your petitioner, who appears here pro se has been incarcerated since April 10,1981. The petitioner was sentenced to a total of six years and committed fines totalling $20,000 and two years special parole on a plea of guilty to four counts charging violations of Title 18 U.S.C. 1952, Title 21 U.S.C. sections 841(a)(1) and (b)(1)(B) and 26 U.S.C. section 7206(1). Sentence was imposed by District Judge Leonard B. Sands, S.D.N.Y.

OPINION BELOW

The opinion of the United States Court of Appeals is annexed herein as Appendix "A", infra at p.

The opinion of the District Court is annexed herein as Exhibit B, infra at p.

JURISDICTION

The determination and order of the Court of Appeals was entered September 22,1982. A petition for rehearing en banc was denied November 16,1982, without opinion.

Jurisdiction herein is invoked under Title 28 U.S.C. section 1254(1). The basis for federal jurisdiction below in the United States District Court was Title 18 U.S.C. section 1952,Title 21 U.S.C. sections 841(a)(1) and (b)(1)(B) and 26 U.S.C. section 7206(1) and Rule 35 Federal R. Crim. Procedure.

STATUTES INVOLVED

The statute involved in Rule 35(b) of the F.R. of Cr.Pr., the pertinent provisions of which are set forth in Appendix "C" infra at p.

STATEMENT OF THE CASE

In January of 1981, the appellant and several others were indicted in the

Southern District of New York. The appellant pled guilty to a violation of Title 18 U.S.C. section 1952, 21 U.S.C. sections 841(a)(1) and (b)(1)(B) and Title 26 U.S.C. 7206 (1), and was sentenced to consecutive terms of two two year terms and two one year terms (total of six years) and committed fines of $5,000 each count, and two years special parole.

At the time of sentencing there was in effect a severity of offense guideline in which was indicated the range of incarceration for various offenses. This guideline ranged from "low" through "moderate", "high" "very high","greatest one" and "greatest two". The pre-sentence investigation report which was before the sentencing judge and upon which the appellant's sentence was based placed the appellant in the "very high"

classification which provided for a range of incarceration of 24-36 months. The Parole Commission designated the appellant as "greatest one" which provided for a range of 40-52 months and directed appellant serve 46 months. On the Rule 35 sentencing hearing the trial judge (Sands,D.J.) stated, with respect to the above :

> It is the craziest system. There is no rationality to it at all. The Court imposes a sentence after receiving a presentence report and then the Parole Commission, in effect, resentences. There is no way that I can be satisfied, based on my observations of the system, that it is a system which makes any sense.

The District Judge after reviewing de novo the entire record of the proceedings "from the time of the entry of the plea to sentencing..in the light of the increased severity guidelines " concluded that the petitioner's offense merited the additional incarceration period.

The Court of Appeals in affirming the District Court noted that while the district court had reviewed "the entire record in the light of the increased severity guidelines" concluded that the reasons which prompted the sentence continue to be determinative.

REASONS FOR ALLOWANCE OF WRIT

The record clearly shows that the Probation Department in the preparation of the petitioner's pre-sentence investigation report to the sentencing Judge provided him with Parole Commission guidelines indicating an offense severity rating providing for a minimum incarceration of 24 months and a maximum of 36 months. The Court then gave the petitioner a six year sentence by multiplying the minimum incarceration period by three (equaling 72 months). This was done in the light of Title 18

U.S.C. section 4205(a) which provided that in the imposition of adult sentences the minimum incarceration required would be one-third of the sentence. Thus on a six year sentence the petitioner would be required to serve a minimum of 24 months before consideration for parole.

It is evident that the original intentions of the sentencing court were frustrated by the actions of the Parole Commission, or alternatively that the sentencing court was provided with erroneous guideline informations. For all practical considerations the sentence of the petitioner has been increased from six years to ten years since his minimum incarceration period was raised to 40 months. The sentencing court recognized this in considering de novo the action from plea to sen-

tence and concluding that the petitioner's offense merited the extra time. This effective resentencing was impermissible and violated the petitioner's due process rights.

On the petitioner's Rule 35 hearing the sentencing Court remarked :

> The original concept was that a Parole Board would have had an opportunity to consider and review the defendant's adjustment to prison and rehabilitation and make some judgment based on these factors. The way the system operates now, the Parole Commission, with the same material before it as was before the Court, in effect determines the practical consequences of the Court's sentence (A-101)

The case before this Court is similar to United States v Slutsky, 514 F. 2d 1222 (2nd Cir. 1975). In Slutsky the defendant was sentenced under the provisions of Title 18 U.S.C. 4208(a)(2)(1970)which provided that the sentencing judge might specify that the

defendant be eligible for parole at such time as the Board of Parole may determine, thus making the defendant immediately eligible for parole. The Board of Parole disregarded these sentence instructions and did not consider parole until at least one third of the sentence was served. The Court of Appeals vacated the sentence of the defendant, reversing the district court's denial of a Rule 35 motion and directed resentencing. The Court stated :

> We are convinced that the parole consideration afforded the Slutskys is likely to depart substantially from what we must assume were the reasonable expectations of the district judge (p.1227)

The sentencing court provided a two year special parole of the petitioner to follow his regular sentence (which includes a parole period), a sentencing period which the court consider-

ed actual incarceration at a maximum of 36 months. This incarceration period was based upon the information supplied the trial judge at the presentence investigation. Whether the Parole Commission was correct as to its determination of the petitioner's offense severity rating is irrelevant. The court on the motion of the petitioner made under Rule 35 had simply to reduce the sentence of the petitioner to conform to its original intent i.e. to 4 years and 6 months. This would have provided the maximum incarceration of 36 months followed by periods of parole and special parole. As was stated in Slutsky, cited supra at 1229 :

> (T)he parole implications of a sentence are a necessary and important factor for the consideration of the sentencing judge. And, when, as here, there has been a timely motion for reduction of sentence, and the

mistake is easily rectified by providing for resentencing, the interests of justice mandate such a procedure.

Such a procedure as was mandated by the Court in Slutsky was equally applicable here. Indeed, here, the district judge reviewed the record "from the time of the entry of the plea to sentencing de novo in the light of the increased offense severity guidelines" (A-122) and in permitting the sentence to stand, denying relief pursuant to Rule 35 F. R. Crim. Pr. the Court in effect imposed a harsher sentence upon the petitioner than that to which he was originally sentenced. This was violative of petitioner's due process rights.

CONCLUSION

This case is one wherein the petitioner has been denied relief under circumstances indicative of deviation from established law. It is further clear

that the within application presents a meritorious, novel and certainly arguable question of a kind likely to arise again and which calls for authoritative disposition by this court.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed and that your petitioner be granted such other, further and different relief as may seem proper.

Dated: Montgomery Pennsylvania
February 1, 1983

MELVIN COOPER
Petitioner
Pro Se
P.O. Box 1000 D4
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CERTIFICATION

STATE OF PENNSYLVANIA }
COUNTY OF LYCOMING } SS:

MELVIN COOPER states pursuant to Title 28 U.S.C. section 1746 and the penalties for perjury therein contained as follows :

That he is the petitioner herein; that he has read the foregoing petition and the same is true to his own knowledge except as to such matters as is stated on information and belief and as to those matters believes the same to be true.

That he verily believes that the foregoing petition is meritorious and states that it is not submitted for any purpose of delay.

Dated: Montgomery Pa.
February 1, 1983

MELVIN COOPER